RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 11 2016
OFFICE OF THE CLERK

16-498

No. 16-___

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

CONFERENCE
APR 21 2017

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

CONFERENCE
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QUESTIONS PRESENTED

Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ("the Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) (*"Patchak I"*).

While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the Bradley Property "shall be promptly dismissed," but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

1. Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

2. Does a statute which does not amend any generally applicable substantive or procedural laws, but deprives Petitioner of the right to pursue his pending lawsuit, violate the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is David Patchak, the plaintiff below.

Respondents are Sally Jewell, Secretary of the Interior, and Lawrence Roberts, Assistant Secretary of the Interior, both defendants below, as well as the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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The Opinion of the United States Court of Appeals for the District of Columbia Circuit addressing issues presented in this Petition was issued on July 15, 2016, is reported at 828 F.3d 995, and is reproduced in the separately bound Appendix to this Petition as Appendix A at 1a.[1] The D.C. Circuit's July 15, 2016 Judgment is reproduced as Appendix B at 23a.

The June 17, 2015 Opinion of the United States District Court for the District of Columbia, addressing issues presented in this Petition, is reported at 109 F. Supp.3d 152 (D.D.C. 2015), and is reproduced as Appendix D at 27a.

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[1] References to the Appendices to this Petition are in the form "1a."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit issued its opinion and entered Judgment on July 15, 2016. *See* Appendix A and B.

CONSTITUTIONAL & STATUTORY PROVISIONS

This Petition concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113–179, 128 Stat. 1913, addressing whether it violates separation of powers principles and the Fifth Amendment to the United States Constitution. The text of the Gun Lake Act and relevant constitutional provisions are reproduced in the accompanying Appendix.[2]

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[2] Although the Appendix contains only portions of Article III (and Article I), as the Court has observed: "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of . . . the structural imperatives of the Constitution as a whole." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982).

INTRODUCTION

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991). "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

This Petition concerns the constitutionality of a statute through which Congress has intruded upon the judicial power.

Section 2(b) of the statute at issue, the Gun Lake Act, directed the federal courts to "promptly dismiss[]" Petitioner's pending case after this Court had reviewed it, and held that his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2203 (2012) (*"Patchak I"*). The statute—which concerns only the one piece of property at issue in Petitioner's lawsuit, and affected only his case—mandated dismissal without amending underlying substantive or procedural laws.

The D.C. Circuit concluded the Gun Lake Act is constitutional. Petitioner respectfully submits that conclusion was erroneous—and sets a dangerous precedent, permitting Congress to encroach upon and exercise powers reserved for the judiciary. If Congress may direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or

procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.

The Court should grant this Petition to address the exceptionally important separation of powers issues presented, and clarify aspects of the boundary between the legislative and judicial powers not directly addressed by the Court's prior decisions. *See* SUP. CT. R. 10(c).

STATEMENT OF THE CASE

A. Petitioner's Complaint in the District Court

On April 18, 2005, the Department of the Interior announced its intention to employ the Secretary's authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take into trust land ("the Bradley Property") for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Gun Lake Tribe"). 70 Fed. Reg. 25596 (May 13, 2005). The Gun Lake Tribe had been recognized by the Department of the Interior in October 1998. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1998).

Petitioner is a resident of Wayland Township, Michigan, who lives in close proximity to the Bradley Property. On August 1, 2008, he filed a complaint in the United States District Court for the District of Columbia, asserting a claim under the Administrative Procedure Act (APA) against the then-Secretary and Assistant Secretary of the Interior, challenging the Secretary's authority under

the IRA to take the Bradley Property into trust for the Gun Lake Tribe.[3] Petitioner argued that acquisition of the Bradley Property for the Gun Lake Tribe (which had not yet occurred because of unrelated litigation following the announcement of the Interior Secretary's intentions) was unauthorized by the IRA because the Tribe was not recognized and "under federal jurisdiction" when the IRA was enacted in 1934. The Gun Lake Tribe filed a motion to intervene, which was granted by the District Court.

While Petitioner's case was pending in the District Court, on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Gun Lake Tribe. *Patchak I*, 132 S.Ct. at 2204.

Less than a month after the Bradley Property was taken into trust by the Secretary, this Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that the IRA "limits the [Interior] Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

Although *Carcieri* cast substantial doubt on the legality of the Secretary's action taking the Bradley Property into trust for the Gun Lake Tribe, which had obtained federal recognition in 1998, the District Court did not reach the merits of Petitioner's APA claim. Instead, on August 19, 2009, the District

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[3] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Court issued an opinion finding that Petitioner lacked prudential standing, and contemporaneously issued an order granting the United States' motion to dismiss and the Gun Lake Tribe's motion for judgment on the pleadings. *Patchak v. Salazar*, 646 F. Supp.2d 72 (D.D.C. 2009).

On appeal, the D.C. Circuit reversed the District Court's dismissal of Petitioner's APA claim, finding he had both prudential and Article III standing. *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). The D.C. Circuit also addressed the question of sovereign immunity briefed by the parties, but not decided by the District Court, concluding that sovereign immunity had been waived. *Id.* at 712.

B. This Court's Prior Decision in this Case

This Court granted the Petitions for certiorari, seeking review of the D.C. Circuit's judgment. 132 S.Ct. 845. The Court considered two questions arising from Petitioner's lawsuit: whether the United States has sovereign immunity by virtue of the Quiet Title Act, 86 Stat. 1176, and whether Petitioner has prudential standing to challenge to Interior Secretary's acquisition of the Bradley Property. The Court determined that sovereign immunity had been waived, and that Petitioner has prudential standing, and "therefore h[e]ld that Patchak's suit may proceed." *Patchak I*, 132 S.Ct. at 2203.

C. Congress's Action to Terminate Petitioner's Lawsuit

Following this Court's decision in *Patchak I*, while Petitioner's case was moving forward in the District Court, Congress took up consideration of

what became the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act). Pub. L. No. 113–179, 128 Stat. 1913.[4]

Section 2(a) provides: "IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."

Section 2(b) provides: "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed."[5]

The Gun Lake Act originated in the Senate, as S. 1603, with a single sponsor and one co-sponsor (both Senators from Michigan, where the Bradley Property is located).

The Senate Committee on Indian Affairs held a hearing during May 2014. At that hearing, the Gun Lake Tribe's Chairman urged passage of the bill because the trust status of his Tribe's land "is now threatened by a U.S. Supreme Court opinion

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[4] The full text of the statute is reproduced as Appendix E at 50-51a.

[5] The statute does not contain a severability provision.

[*Patchak I*] that has allowed one individual to challenge the authority of the Secretary of Interior to take land into trust for our Tribe," and because "it is now time for this dispute to come to an end." *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509 at 55 (2014) (statement of David K. Sprague).

At the same Senate hearing the Assistant Secretary–Indian Affairs from the Department of the Interior also pressed for enactment of the bill, contending that this Court's decision in *Patchak I* "undermines the primary goal of Congress in enacting the Indian Reorganization Act" and "imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions ...." The Assistant Secretary expounded on his criticism of this Court's opinion in *Patchak I*, opining on the need for "legislation to address *Patchak*." *Id.* at 9 (statement of Kevin Washburn).

The Senate Report addressing the bill observed that Petitioner's lawsuit "currently pending before a federal district court [] places in jeopardy the Tribe's only tract of land held in trust .... The bill would provide certainty to the legal status of the land" and "would extinguish all rights to legal actions relating to the trust lands." S. Rep. No. 113-194, at 2-3 (2014). The Report also stated that enactment "will not make any changes in existing law." *Id.* at 4.

The Senate approved S. 1603 by voice vote on June 19, 2014.

The legislation then moved to the House, where the Subcommittee on Indian and Alaska Native Affairs held a hearing during July 2014. At that

hearing, the Gun Lake Tribe's Chairman and the Assistant Secretary–Indian Affairs provided testimony substantively identical to their testimony before the Senate Committee on Indian Affairs. *See Legislative Hearing on S. 1603 Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources* (July 15, 2014) (statement of David K. Sprague) (testimony of Kevin Washburn).

The House Report addressing the bill observed "[t]he need for S. 1603 stems from what is now understood to be a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe," and "S. 1603 would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property . . . filed by a neighboring private landowner named David Patchak." H. Rep. No. 113-590, at 2 (2014). The House Report also noted that "S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri* [555 U.S. 379 (2009)]," and—like the Senate Report—stated that enactment "would make no changes in existing law." *Id.* at 2, 5.

On September 16, 2014, the House voted 359-64 in favor of the bill.

The Gun Lake Act was signed by the President on September 26, 2014.

D. Decisions Below Concerning the Gun Lake Act

Because summary judgment briefing was underway in the District Court when the Gun Lake Act became law, the parties addressed its constitutionality in conjunction with other issues and arguments relevant to those motions.

Petitioner argued to the District Court that the Gun Lake Act is unconstitutional for several reasons—including that it violates separation of powers principles and the Fifth Amendment, as well as the First Amendment's right to petition, and the prohibition on bills of attainder. The District Court, however, rejected each of these arguments, and found that "the Gun Lake Act is constitutional" and that "the Act's plain language and legislative history manifest a clear intent to moot this litigation." Appx. D at 34a, 36a. Believing it "lack[ed] the jurisdiction to reach the merits of plaintiff's claim," the District Court granted the Gun Lake Tribe's motion for summary judgment. Appx. D at 36a.

On appeal, the D.C. Circuit rejected all arguments that the Gun Lake Act is unconstitutional, and affirmed the District Court's disposal of the case because "if an action relates to the Bradley Property, it must promptly be dismissed." Appx. A at 11a-12a.

REASONS FOR GRANTING THE PETITION

I. The Court Must Guard Against Separation of Powers Violations

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Consistent with this "responsibility to enforce the [separation of powers] principle when necessary," *Metropolitan Washington Airports*

Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991), the Court has numerous times found constitutional violations based on separation of powers considerations. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 503 (2011) (finding unconstitutional vesting in bankruptcy court powers reserved for Article III judges); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding unconstitutional statute requiring federal courts to reopen final judgments); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (Congress "intruded into the executive function"); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (finding "legislative veto" unconstitutional); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (finding statute's assignment of certain powers to bankruptcy judges unconstitutional as "unwarranted encroachment" on the "judicial power"); *United States v. Klein*, 13 Wall. 128, 147 (1871) ("Congress has inadvertently passed the limit which separates the legislative from the judicial power.").

This Court's vital function as guardian of separation of powers safeguards and principles includes reviewing and deciding cases raising serious separation of powers questions—even if the Court ultimately concludes no violation has occurred. *See, e.g., Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016); *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

II. The Questions Presented Are Exceptionally Important

"Time and again" this Court has "reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches." *Morrison*, 487 U.S. at 693.

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut*, 514 U.S. at 224. It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending the IRA, the APA, or any other generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*.

If Congress is permitted to direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees. And the threat to the judicial power posed by the Gun Lake Act is particularly grave because it was enacted with the purpose and effect of "void[ing]" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Patchak I*, 132 S.Ct. at 2203.

III. The Case is an Ideal Vehicle to Address Unresolved Issues Concerning the Separation of Powers, and Clarify When Congress Has Infringed the Judicial Power

Section 2(b) of the Gun Lake Act is an unprecedented intrusion on the judicial power. While Petitioner contends the Gun Lake Act should have been declared unconstitutional based on this Court's existing decisional law, the statute and the circumstances giving rise to it unquestionably test the limits of Congress's authority to act without intruding upon the judicial power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10(c).

That this case concerns a single statute, directed at extinguishing a single pending federal court case, should not dissuade the Court from granting the Petition. While the adverse impact of the Gun Lake Act on Petitioner may not itself rise to the level of national significance, "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

Nor should the Court wait for Congress to again invade the judicial power as it has with Section 2(b) of the Gun Lake Act. "It is not every day that [the

Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2617 (2014) (Scalia, J., concurring).

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013) (Roberts, C.J., dissenting). "[The Court] may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Department of Justice*, 491 U.S.

440, 468 (1989) (Kennedy, J., concurring in judgment)).[6]

IV. The D.C. Circuit's Decision is in Tension With Ninth Circuit Law

The D.C. Circuit's decision below is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), which held that a statutory provision directing decisions in pending cases without amending any law was unconstitutional under this Court's decision in *Klein*, 13 Wall. 128 (1871). Although this Court reversed that Ninth Circuit decision in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) on other grounds, it did "not consider whether this reading of *Klein* is correct." *Id.* at 441.

The Ninth Circuit has continued to rely on its reading of *Klein* after this Court's decision in *Robertson*, 503 U.S. 429. *See, e.g., The Ecology Center v. Casaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993) ("This Court has interpreted *Klein* and related Supreme Court authority . . . as establishing a two-part, disjunctive test: The constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly

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[6] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See, e.g., Bank Markazi*, 136 S.Ct. 1310; *Stern*, 564 U.S. 462; *Loving*, 517 U.S. 748; *Plaut*, 514 U.S. 211; *Robertson*, 503 U.S. 429; *Freytag*, 501 U.S. 868; *Morrison*, 487 U.S. 654; *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919; *Northern Pipeline*, 458 U.S. 50; *Nixon*, 433 U.S. 425; *Klein*, 13 Wall. 128.

directed certain findings in pending litigation, without changing any underlying law,' or (2) 'a challenged statute [is] independently unconstitutional on other grounds.'") (quoting *Robertson*, 914 F.2d at 1315-16). *Cf. United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) ("When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it."); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight . . . .").

Granting the Petition would allow this Court to address and resolve tension between the D.C. Circuit's decision in this case and Ninth Circuit law. *See* SUP. CT. R. 10(a).

V. The Gun Lake Act Is Unconstitutional, and the D.C. Circuit's Decision to the Contrary Was Incorrect

It is difficult to imagine a more direct invasion of the judicial power than occurred here: Congress, without amending underlying substantive or procedural laws, directed that any case relating to the parcel of property which was the subject of Petitioner's APA claim "shall be promptly dismissed," after this Court expressly held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. If Congress had the power to intervene and dictate the

outcome in this case by enacting the Gun Lake Act, then it has the same, seemingly unlimited, power with respect to any pending case.

Although "it can sometimes be difficult to draw the line between legislative and judicial power," *Bank Markazi*, 136 S.Ct. at 1336 (Roberts, C.J., dissenting), this is not such a case. And "the entire constitutional enterprise depends on there *being* such a line." *Id.*

The Gun Lake Act dangerously violates separation of powers principles—and the D.C. Circuit's decision to the contrary was incorrect.

A. Section 2(b) of the Gun Lake Act Impermissibly Mandated that Petitioner's Lawsuit Be "Promptly Dismissed" Without Amending Underlying Substantive or Procedural Laws

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. And they deliberatively and decisively "rejected the practice [of colonial legislative review of judicial decisions] . . . because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment." *Id.* at 265-66 (Stevens, J., dissenting).

Adhering to the Framers' intention and constitutional design, the Court has repeatedly

confirmed that the judicial power cannot be shared with another branch of government. *See, e.g.*, *Stern*, 564 U.S. at 483; *Northern Pipeline*, 458 U.S. at 58; *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Court also long ago recognized that "Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. 641, 648 (1874); *see also Hayburn's Case*, 2 Dall. 409, 413 (1792) (citing Letter from Iredell, J., and Sitgreaves, D.J., to President George Washington (June 8, 1792)) ("[N]o decision of any court of the United States can under any circumstances . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested."); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19.

Accordingly, one of "basic constraints on the Congress" imposed by the Constitution is that it may not "invest itself or its Members with either executive power or judicial power." *Metropolitan Washington Airports Authority*, 501 U.S. at 274; *see also Miller*, 530 U.S. at 350 ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design."); *Freytag*, 501 U.S. at 891 (finding Tax Court "exercises judicial power," noting "[i]ts decisions are

not subject to review by either the Congress or the President"); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.").

Although this Court has not previously confronted an intrusion on the judicial power quite like that effected by Section 2(b) of the Gun Lake Act, the principles recognized and secured in the Court's prior decisions instruct that the Gun Lake Act invades and weakens the judicial power, and thereby violates the separation of powers.

For example, Section 2(b) of the Gun Lake Act is similar to a portion of the statute at issue in *United States v. Klein*, 13 Wall. 128, 147 (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" the courts "to dismiss" pending cases without altering applicable legal standards.

This case and *Klein* stand apart from those where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them. *See, e.g.*, *Bank Markazi*, 136 S.Ct. at 1323-24 (contrasting that case with *Klein*), 1326 (no separation of powers violation because statute "changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested and uncontested) found by the court"). *Robertson*, 503 U.S. at 437 (no separation of powers

violation because statute "replaced legal standards . . . without directing particular applications under either the old or the new standards"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (addressing effect of change in underlying law by Congress).

While dissimilar to the statute actually at issue in *Bank Markazi*, the Gun Lake Act resembles the hypothetical statute discussed by Chief Justice Roberts in his *Bank Markazi* dissent, which directed that "Smith wins" his pending case, *Bank Markazi*, 136 S.Ct. at 1334-35 (Roberts, C.J., dissenting)—a statute which all members of the Court agreed "would be invalid." *Bank Markazi*, 136 S.Ct. at 1326 (noting potential constitutional infirmities, including Congress impermissibly compelling results "under old law" without "supply[ing] any new legal standard"). Indeed, Section 2(b) of the Gun Lake Act did precisely what this Court said had been impermissible in *Klein*: it "infringed the judicial power . . . because it attempted to direct the result without altering the [applicable] legal standards." *Id.*, 136 S.Ct. at 1324.

When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving*, 517 U.S. at 757.

B. Section 2(b) of the Gun Lake Act is Unconstitutional, Regardless of What Congress Intended to Accomplish in Section 2(a)

Section 2(a) of the Gun Lake Act provided that the Bradley Property "is reaffirmed as trust land," and "the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." The meaning and effect of this language is hardly self-evident. The Court of Appeals viewed Section 2(a) as having "changed the law" (Appx. A at 11a)—although it did not explain how.[7]

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[7] The D.C. Circuit also mistakenly viewed the Gun Lake Act as "removing *jurisdiction* from the federal courts over any actions relating to [the Bradley Property]." Appx. A at 2a. (emphasis added). This was an error for several reasons. First, the statute does not address jurisdiction—in fact, the word "jurisdiction" does not appear anywhere in its title, headings or text. Second, this Court has adopted a "bright line" test for determining whether a statutory limitation is jurisdictional, treating restrictions as nonjuridictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Regional Medical Center*, 135 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006)). This "bright line" test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Underscoring the absence of a clear statement is the Gun Lake Act's use of the term "maintain," which this Court has recognized is "ambiguous," and "enjoys a breadth of meaning." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003). Third, the legislative history corroborates the statute is not jurisdictional—neither the House nor Senate Reports describe the law as altering federal court jurisdiction; to the contrary, each Report states the statute would not make any "changes in

Petitioner believes Section 2(a) did not put the Bradley Property into trust. As the statute itself clearly states, it was enacted to "[t]o reaffirm that certain land *has been* taken into trust"—this is, it conveyed Congress's post-hoc endorsement of the Interior Secretary's decision (which the House Report described as "likely unlawful"[8]), seemingly without *itself* changing the legal status of the property. For that reason, both the House and Senate Reports concerning the Gun Lake Act stated the statute would make no "changes in existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014); *see also* (Appx. A at 11a) (D.C. Circuit noting Section 2(a) ratified and confirmed "*the Department of the Interior's* decision to take the Bradley Property into trust.") (emphasis added).

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existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). But Section 2(b) of the Gun Lake Act would violate the separation of powers even if the statute was ostensibly "jurisdictional." When enacting the Gun Lake Act "Congress's sole concern was deciding this particular case." *Bank Markazi*, 136 S.Ct. at 1333 (Roberts, C.J., dissenting). Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction would not permit it to exercise the judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities. *Cf. City of Boerne*, 521 U.S. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."). And, in any event, the importance of the Questions Presented by this Petition would not be diminished were the Gun Lake Act labeled as a jurisdictional statute.

[8] H. Rep. No. 113-590, at 2.

But even if the *intent* of Section 2(a) was to put the Bradley Property into trust, this would have led to numerous legal issues ***to be decided by the courts***—including (1) whether Section 2(a) actually did take the land into trust; and (2) if Section 2(a) did take the land into trust, how that impacted Petitioner's pending APA claim (including his entitlement to relief requested in his Complaint, such as a declaration that *the IRA* did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees—neither of which are obviously impacted by Section 2(a), regardless of how it is interpreted).

Among the issues confronting the courts interpreting and applying Section 2(a) would have been any purported retroactive effect of Congress taking the Bradley Property into trust long after Petitioner filed his APA claim, and subsequent to this Court's decision that his APA claim "may proceed." *See Johnson v. United States,* 529 U.S. 694, 701 (2000) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests"); *Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994) (requiring clear statement for retroactive civil legislation).

Yet the lower courts *could not* address any unresolved legal questions arising from Section 2(a) —including the meaning and effect of that provision, and its potential retroactive application—because Congress precluded the Courts from deciding any of these when, in Section 2(b), it directed that Petitioner's pending case "shall be promptly dismissed." The D.C. Circuit—while mistaken about the constitutionality of the Gun Lake Act—made

clear Section 2(b) was dictating the outcome of Petitioner's appeal, explaining: "if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action." Appx. A at 11a-12a.

Thus, the presence of Section 2(a) in the Gun Lake Act does not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA case. However, with Section 2(b) of the Act, Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts of the case.

Perhaps Section 2(a) would have aided the Secretary in defending against Petitioner's APA claim on the merits. But Congress decided Petitioner's case by itself when mandating that it be "promptly dismissed"—and in so doing exercised the judicial power reserved for the federal courts by Article III. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("the judicial function [is] deciding cases"); *Ex Parte Slater*, 246 U.S. 128, 133 (1918) ("[E]xercise of the judicial function" is "applying recognized legal and equitable principles to the facts in hand").

C. Petitioner Has Been Deprived of Individual Rights Which Structural Separation of Powers Principles are Designed to Safeguard

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011); *see*

also Noel Canning, 134 S.Ct. at 2593 (It is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'") (Scalia, J., concurring) (quoting *Bond*, 564 U.S. at 223). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The threat to individual rights is particularly acute when the political braches intrude upon the judicial power. Separation of the judiciary was "to guarantee that the process of adjudication itself remained impartial," *Northern Pipeline*, 458 U.S. at 58, and Article III safeguards litigants' "rights to have claims decided before judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980).

Having experienced and rejected a system of intermingled legislative and judicial powers, *Plaut*, 514 U.S. at 219, the Framers recognized—as has this Court—that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton, quoting 1 Montesquieu, Spirit of Laws 181); *see also Stern*, 564 U.S. at 483.

Here, with Section 2(b)'s mandate that Petitioner's pending case be "promptly dismissed," Congress arrogated to itself the judicial role of deciding Petitioner's APA claim—and did so after this Court had already determined that his "suit

may proceed." In so doing, Congress stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.

Section 2(b) also deprived Petitioner of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Gun Lake Act concerns only the Bradley Property and—as the D.C. Circuit acknowledged—"only affected [Petitioner's] lawsuit." Appx. A at 12a. The statute did not change any generally applicable substantive or procedural laws—including the APA and the IRA. Instead, as the text and legislative history make clear, its purpose and effect was to "void" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, stripping him of the right to continue pursuing what this Court described as a "garden variety APA claim" alleging that "the Secretary's decision to take land into trust violates a federal statute." *Patchak I*, 132 S.Ct. at 2208.[9]

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[9] Even if Section 2(a) had the effect of taking the Bradley Property into trust at the time the Gun Law Act was enacted, the statute does not state it would have retroactive effect, and in any event Section 2(a) has no bearing on the core of Petitioner's APA claim: a challenge to *the Interior Secretary's authority under the IRA* to take the land into trust. With Section 2(b), Congress left the APA's substantive and procedural provisions available to everyone but Petitioner (there were no other pending suits concerning the Bradley Property). As a result, Petitioner lost his right to seek a declaration that the IRA did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees.

Section 2(b) violates Petitioner's right to equal protection, regardless of what level of scrutiny is applied. Even under rational basis scrutiny, a classification must bear "a rational relationship to a legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, the only objective evident from Section 2(b)'s text and the legislative history is overcoming this Court's decision in *Patchak I*, and extinguishing Petitioner's lawsuit after this Court held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. That is not a "legitimate end" capable of sustaining disparate treatment.[10]

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[10] That the Gun Lake Act concerns only the Bradley Property, and was specifically intended to dispose of Petitioner's lawsuit, suggests Congress sought to impermissibly *apply* the law, rather than make it. *See Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (discussing relevance of statute's "application to a limited number of individuals"); *see also United States v. Brown*, 381 U.S. 437, 442 (1965) (Bill of Attainder Clause intended to supplement separation of powers, acting as "a general safeguard against legislative exercise of the judicial function").

CONCLUSION

Congress has "passed the limit which separates the legislative from the judicial power," but "[i]t is of vital importance that these powers be kept distinct." *Klein*, 13 Wall. at 147.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

October 2016

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges.*

Argued May 13, 2016
Decided July 15, 2016

Opinion for the Court filed by Circuit Judge WILKINS.

Appendix A

WILKINS, *Circuit Judge*: David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court's determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak's claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit, as well as a collateral decision regarding the District Court's denial of a motion to strike a supplement to the administrative record. For the reasons stated below, we affirm the District Court's determination that the Gun

Lake Act is constitutionally sound and, accordingly, that Mr. Patchak's suit must be dismissed. We further conclude that the District Court did not abuse its discretion by denying Mr. Patchak's motion to strike a supplement to the administrative record.

I.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Gun Lake Tribe) is an Indian tribe whose members descend from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who occupied present day western Michigan. *See Proposed Findings for Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 62 Fed. Reg. 38113, 38113 (July 16, 1997). While the Tribe had been a party to many treaties with the United States government in the 18th and 19th centuries, it only began pursuing federal acknowledgement under the modern regulatory regime of the Bureau of Indian Affairs, 25 C.F.R. §§ 83.1-83.46, in 1992. The Tribe was formally recognized by the Department of the Interior in 1999. In 2001, the Tribe petitioned for a tract of land in Wayland Township, Michigan — called the Bradley Property — to be put into trust under the IRA. The Tribe sought to use the land to construct and operate a gaming and entertainment facility. The Bureau of Indian Affairs approved the petition in 2005, placing the Bradley Property into trust for the Tribe's use. *See Notice of Determination*, 70 Fed. Reg. 25596, 25596 (May 13, 2005). The Gun Lake Casino opened on February 10, 2011.

Appendix A

David Patchak lives in a rural area of Wayland Township commonly referred to as Shelbyville, in close proximity to the Bradley Property. Mr. Patchak asserts that he moved to the area because of its unique rural setting, and that he values the quiet life afforded him there. Mr. Patchak filed the present lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior for the Bureau of Indian Affairs on August 1, 2008, invoking the court's jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 705. Mr. Patchak claimed that he would be injured by the construction and operation of a casino in his community because it would, among other things, irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents. Mr. Patchak argued that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked the authority to put the Bradley Property into trust for the Gun Lake Tribe.[1] The Gun Lake Tribe intervened as a defendant.

In response to Mr. Patchak's complaint, the United States and the Tribe claimed that Mr. Patchak lacked prudential standing because his interest in the Bradley Property was "fundamentally at odds with the purpose

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1. Mr. Patchak's arguments on the merits of his claim rely heavily on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), published after he initially filed his lawsuit. *Carcieri* interpreted part of the recognition provision of the IRA, 25 U.S.C. § 479. 555 U.S. at 387-93. Because we do not reach the merits of Mr. Patchak's claim in this appeal, we do not consider the impact of *Carcieri* in this case.

of the IRA" and he therefore did not fall within the IRA's "zone of interests." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The District Court agreed, and dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 76, 79. Patchak appealed to this Court, and we reversed. *See Patchak v. Salazar*, 632 F.3d 702, 394 U.S. App. D.C. 138 (D.C. Cir. 2011). The Supreme Court agreed, holding that Patchak did indeed have prudential standing to bring his suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2212. The case was remanded to the District Court for further proceedings.

In the time between the Supreme Court's prudential standing determination and the parties' renewed attention to the case, both the Department of the Interior and Congress weighed in further on the legal status of the Gun Lake Tribe and the Bradley Property, respectively. First, the Department of the Interior issued an Amended Notice of Decision approving an application the Tribe had submitted for two other parcels of land it sought to acquire. As part of this Notice of Decision, the Secretary expressly considered, and confirmed, its authority to take land into trust for the benefit of the Gun Lake Tribe. Second, on September 26, 2014, President Obama signed the Gun Lake Act into law. The substantive text of the Gun Lake Act is as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of

> the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.
>
> (c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Gun Lake Act § 2.

Shortly following the enactment of the Gun Lake Act, the parties filed motions for summary judgment. The District Court determined that, as a result of this legislation, it was now stripped of jurisdiction to consider Mr. Patchak's claim. *See Patchak v. Jewell*, 109 F. Supp. 3d 152, 159 (D.D.C. 2015). Rejecting Mr. Patchak's constitutional challenges to the Gun Lake Act, the District Court granted summary judgment in favor of the Government and the Tribe, and dismissed the case. *Id.* at 160-65. The District Court also denied Mr. Patchak's

Appendix A

Motion to Strike the Administrative Record Supplement, which had challenged the addition of the Amended Notice of Decision to the record before the court. *See* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). Mr. Patchak now appeals those decisions.

II.

The language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction to consider the merits of Mr. Patchak's complaint, which undisputedly "relat[es] to the land described" in Section 2(a) of the Act. Gun Lake Act § 2(b). Accordingly, Patchak's suit "shall not be . . . maintained . . . and shall be promptly dismissed." *Id.* Of course, this is only so if the Gun Lake Act is not otherwise constitutionally infirm, as "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (citing RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996)). The federal courts have "presumptive jurisdiction . . . to inquire into the constitutionality of a jurisdiction-stripping statute." *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008).

Mr. Patchak's constitutional challenges to the Gun Lake Act are pure questions of law that we review *de novo*. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001).

Appendix A

A.

Mr. Patchak first argues that the Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of wellestablished constitutional principles of the separation of powers. Article III imbues in the Judiciary "the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). This endowment of authority necessarily "blocks Congress from 'requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.'" *Id.* at 1322-23 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases. *See Bank Markazi*, 136 S. Ct. at 1325. Without question, "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* This rule is no different when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096. It is well settled that "Congress has the power (within limits) to tell the courts what classes of cases they may decide." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Congress may not, however, "prescribe or superintend how [courts] decide those cases." *Id.* at 1869. Congress impermissibly encroaches upon the judiciary when it "prescribe[s] rules of decision" for a pending case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). In short, Congress may

not direct the result of pending litigation unless it does so by "supply[ing] new law." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992). Mr. Patchak argues that the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law.

These principles do not require, as Mr. Patchak suggests, that in order to affect pending litigation, Congress must directly amend the substantive laws upon which the suit is based. Indeed, Supreme Court precedent belies such a contention.

In *Seattle Audubon*, for example, the Supreme Court considered the impact of new legislation on pending cases challenging the federal government's efforts to allow the harvesting and sale of old-growth timber in the Pacific Northwest. 503 U.S. at 431. The legislation was the Northwest Timber Compromise, a provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989). *Id.* at 433. It established rules to govern the forest harvesting at issue in the pending consolidated cases, and spoke expressly to those suits — even identifying them by caption number. *Id.* at 433-35. If loggers complied with the new rules, Congress posited, they would thereby satisfy the statutory obligations on which the pending environmental litigation rested. *Id.* The Ninth Circuit held that the Northwest Timber Compromise unconstitutionally dictated the outcome of pending litigation without amending the underlying laws, but the Supreme Court disagreed. The Court held that the legislation effectively "replaced the legal standards

underlying the two original challenges . . . without directing particular applications under either the old or the new standards." *Id.* at 436-37. Because the provision "compelled changes in law," *id.* at 438, the Court concluded that the provision "affected the adjudication of the [specifically identified] cases . . . by effectively modifying the provisions at issue in those cases," *id.* at 440.

The Supreme Court's recent *Bank Markazi* decision likewise applied new legislation to pending litigation. That legislation did not directly amend or modify the particular statute upon which the pending litigation was based. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, 22 U.S.C. § 8772 (2012) had been passed in order "[t]o place beyond dispute" the availability of certain assets for satisfaction of judgments rendered in certain specifically identified terrorism cases. *Bank Markazi*, 136 S. Ct. at 1318. The statute was enacted as a freestanding measure, not as an amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA) (which allows American nationals to file suit against state sponsors of terrorism in United States courts, *see* 28 U.S.C. § 1605A), or the Terrorism Risk Insurance Act of 2002 (TRIA) (which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party"). *Id.* Rejecting a challenge similar to the one Mr. Patchak pursues here — that the provision "did not simply amend pre-existing law," *id.* at 1325 — the Court held that "§ 8772 changed the law by establishing new substantive standards," *id.* at 1326. As the Court explained, "§ 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored

terrorist attacks will be permitted to execute against those assets." *Id.*

Our decision in *National Coalition to Save Our Mall* is also instructive. There, we considered a separation-of-powers challenge to a statute that withdrew from the federal courts subject matter jurisdiction to review challenges to specific executive decisions relating to the placement of the World War II Memorial on the National Mall. 269 F.3d at 1096-97. In rejecting that challenge, we emphasized that there is no "prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Id.* at 1096. And while this Court "express[ed] no view" on the question whether a court could do so without amending the substantive law on which a pending claim rested, we did note that the provision at issue (Public Law No. 107-11) "present[ed] no more difficulty than the statute upheld in [*Seattle Audubon*], as Public Law No. 107-11 similarly amend[ed] the applicable substantive law." 269 F.3d at 1097.

Consistent with those decisions, we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." *Bank Markazi*, 136 S. Ct. at 1326. More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action

relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

That this change has only affected Mr. Patchak's lawsuit does not change our analysis here, for Congress is not limited to enacting generally applicable legislation. Particularized legislative action is not unconstitutional on that basis alone. *See Bank Markazi*, 136 S. Ct. at 1327-28; *Plaut*, 514 U.S. at 239 n.9; *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut*, 514 U.S. at 239 n.9.

In passing the Gun Lake Act, Congress exercised its "broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as '"plenary and exclusive."' *United States v. Lara*, 541 U.S. 193, 200 (2004). Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Bank Markazi*, 136 S. Ct. at 1326.

B.

Mr. Patchak next asserts that the Gun Lake Act burdens his First Amendment right to petition. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). The Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government

for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The right of access to courts is, without question, "an aspect of the First Amendment right to petition the government." *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)); *see also Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972). It is an important right, *see Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983), but it is not absolute, *see McDonald v. Smith*, 472 U.S. 479, 484 (1985). For example, an individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation. *Id.* More to the point, the right to access federal courts is subject to Congress's Article III power to define and limit the jurisdiction of the inferior courts of the United States. *See* U.S. CONST. art. III, § 1; *cf. Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Ameur v. Gates*, 759 F.3d 317, 326 (4th Cir. 2014). Congress may withhold jurisdiction from inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

Moreover, the Gun Lake Act does not foreclose Mr. Patchak's right to petition the government in all forums; it affects only his ability to do so via federal courts. And while he argues that other forms of petition — such as seeking redress directly from the agency — would be futile, Patchak concedes that he is not entitled to a successful outcome in his petition, or even for the government to listen or respond to his complaints. Rightfully so. "Nothing

in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also We the People Found., Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007).

By stripping federal courts of subject matter jurisdiction over challenges to the status of the Bradley Property, Congress has made its determination as to what is "proper for the public good." *Palmore*, 411 U.S. at 401 (quoting *Cary*, 44 U.S. (3 How.) at 245). There is no constitutional infirmity here.

C.

Mr. Patchak also claims that the Gun Lake Act implicates his rights under the Fifth Amendment's Due Process Clause. The Fifth Amendment instructs that the federal government may not deprive individuals of property "without due process of law." U.S. CONST. amend. V. In order to determine whether there has been a violation of due process rights, we undertake a two-part inquiry: first, we must determine whether the claimant was deprived of a protected interest; and second, if the claimant was so deprived, we then consider what process the claimant was due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

Mr. Patchak identifies a potentially protected property interest in his unadjudicated claim. The Supreme Court has "affirmatively settled" that a cause of action is a species of property requiring due process protection. *Logan*, 455 U.S. at 428 (analyzing due process rights under the Fourteenth Amendment) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Surely so, as "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)). Once the legislature confers an interest by statute, it may not constitutionally authorize the deprivation of that interest without implementing appropriate procedural safeguards. *Id.* at 432.

But even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due. As discussed above, the legislature has the power to change the underlying laws applicable to a case while it is pending and, as a result, to alter the outcome of that case. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096; *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (where "a law intervenes and positively changes the rule which governs, the law must be obeyed").

In *Logan*, the Supreme Court acknowledged that "[o]f course," a legislature "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily-created causes of action

altogether—just as it can amend or terminate" benefits programs it has put into place. 455 U.S. at 432; *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92 (1980) (Marshall, J., concurring) ("[T]he Due Process Clause does not forbid the 'creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929))). Indeed, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917). Accordingly, while a cause of action may be a "species of property" that is afforded due process protection, *Logan*, 455 U.S. at 428, there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action, *id.* at 432. In such a circumstance, "the legislative determination provides all the process that is due." 455 U.S. at 433.

We have no reason to except the Gun Lake Act from this general approach. Congress made a considered determination to ratify the Department of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe, and further to remove any potential impediments to the finality of that decision. It did not violate Mr. Patchak's due process rights by doing so.

D.

Mr. Patchak's final constitutional challenge to the Gun Lake Act is that it constitutes an impermissible Bill of Attainder. *See* U.S. CONST. art. I, § 9, cl. 3. Under

this provision, Congress may not "enact[] 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)). A law is prohibited under the Bill of Attainder Clause if two elements are met: (1) the statute applies with specificity; and (2) the statute imposes punishment. *Id.* at 1217. We are able to resolve Mr. Patchak's challenge on the second element alone, because the Gun Lake Act is not punitive.

In order to decide whether a statute impermissibly inflicts punishment, we consider each case in "its own highly particularized context." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). In so doing, we pursue a three-part inquiry:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment;
>
> (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and
>
> (3) whether the legislative record 'evinces a congressional intent to punish.'

Id. (quoting *Nixon*, 433 U.S. at 475-76, 478). These factors are considered independently, and are weighed together to resolve a bill of attainder claim. *See Foretich*, 351 F.3d at 1218. None of the three factors is necessarily dispositive, but this Court has noted that the second factor — what is called the "functional test" — "invariably appears to be the most important of the three." *Id.* (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998)).

Historically, laws invalidated as bills of attainder "offer[ed] a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [Article] I, § 9." *Nixon*, 433 U.S. at 473. "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich*, 351 F.3d at 1218. Jurisdictional limitations are generally not of this type. *See Ameur*, 759 F.3d at 329 ("[J]urisdictional limits are usually not viewed as traditional 'punishment.'"); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) ("Jurisdictional limitations . . . do not fall within the historical meaning of legislative punishment."); *see also Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008) (declining to find that a "generally applicable jurisdictional rule" amounted to a bill of attainder in part because it "d[id] not impose punishment of any kind"); *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (jurisdictional limitation "d[id] not impose a punishment 'traditionally adjudged to be prohibited by the Bill of Attainder Clause'" (quoting *Nixon*, 433 U.S. at 475)).

The second prong of the inquiry, the "functional test," requires that the legislation have "a legitimate nonpunitive purpose" and that there is "a rational connection between the burden imposed and [the] nonpunitive purposes." *Foretich*, 351 F.3d at 1220-21. In other words, the means employed by the statute must be rationally designed to meet its legitimate nonpunitive goals.

The Gun Lake Act passes this test. The Gun Lake Act serves the legitimate nonpunitive purpose of "provid[ing] certainty to the legal status of the [Bradley Property], on which the Tribe has begun gaming operations as a means of economic development for its community." S. REP. No. 113-194, at 2 (2014). Congress accomplished this goal by affirming and ratifying the Department of the Interior's initial decision to put the land into trust for the Tribe in Section 2(a), but also by removing jurisdiction over matters relating to the land in Section 2(b). In point of fact, Congress's intended goal of providing certainty with respect to the trust land would have been impossible to achieve absent the termination of any outstanding litigation — specifically, Mr. Patchak's suit. The legislative history reflects an acknowledgement of this fact, noting that Mr. Patchak's suit "places in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land." *Id.* Whatever burden is imposed by Section 2(b), on Mr. Patchak or otherwise, the statute is rationally designed to meet its legitimate, nonpunitive purpose of providing certainty with respect to the trust land.

Finally, the legislative record does not evince a congressional intent to punish. Mr. Patchak has presented

no evidence, other than the acknowledgement that his case would be affected, for his claim that Congress purposefully targeted him for retaliation through the Gun Lake Act. While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.

E.

The Government suggests that there is an alternative ground on which we could rule, arguing that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity. While the Government did not make this argument in the proceedings below, sovereign immunity is a threshold jurisdictional question that speaks to the court's authority to hear a given case, and so we would be well within bounds to consider the question. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Indeed, the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Nevertheless, because we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn, we need not consider the matter further.

III.

In a separate challenge to the proceedings below, Mr. Patchak contends that the District Court erred by permitting the administrative record to be supplemented. We review the District Court's denial of Mr. Patchak's Motion to Strike the Administrative Record Supplement for abuse of discretion. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

Although this case may not present circumstances typically permitting the agency to supplement the record, *see id.*, the District Court's failure to strike the supplemental information provided to it was not an abuse of discretion. The District Court denied Mr. Patchak's Motion to Strike Supplemental Record "[f]or the reasons set forth in the Memorandum Opinion" entered on the same date, *see* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). — *i.e.*, the District Court's determination, at issue in this appeal, that it was without jurisdiction to consider the suit and that the case was to be dismissed in its entirety, *Patchak v. Jewell*, 109 F. Supp. 3d 152 (D.D.C. 2015). The District Court only mentioned the record supplement in the Procedural Background section of its opinion in order to indicate the "events [that] have altered the legal landscape" in the time since the case was remanded from the Supreme Court. *Id.* at 158. The District Court did not abuse its discretion by referencing that development in this way. Nor did it abuse its discretion by denying a motion to strike a supplement to the record at the same time that it was dismissing the case in its entirety for lack of jurisdiction.

IV.

For the foregoing reasons, the District Court's decisions below are affirmed.

So ordered.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

September Term, 2015
Filed On: July 15, 2016

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*

Appendix B

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the decisions of the District Court appealed from in this cause are hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 15, 2016

Opinion for the court filed by Circuit Judge Wilkins.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, *et al.*,[1]

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior, for the former Secretary, Ken Salazar.

Appendix C

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is this 16th day of June 2015, hereby

ORDERED that Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment [Dkt. #80] is **DENIED**; it is further

ORDERED that Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion to Strike the Administrative Record Supplement [Dkt. # 76] is **DENIED**; and it is further

ORDERED that this case be **DISMISSED**.

SO ORDERED.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX D

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,[1] *et al.*,

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

---

1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior for the former Secretary, Ken Salazar.

Appendix D

MEMORANDUM OPINION

(June 16, 2015) [Dkts. ##76, 78, 80, 89]

This case is before the Court on remand from the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. Plaintiff David Patchak ("plaintiff") is challenging the Secretary of the Interior's ("Secretary") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of the Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. In a Verified Complaint filed on August 1, 2008, plaintiff sought an injunction barring the Secretary from taking the land into trust, claiming that the Secretary lacked authority to do so under the IRA. Compl. ¶ 28 [Dkt. #1]. This Court dismissed the case for lack of standing on August 20, 2009. Mem. Op. [Dkt. #56]. Following remand by the Supreme Court, both parties filed motions for summary judgment. Presently before the Court are Plaintiffs Motion to Strike the Administrative Record Supplement [Dkt. #76], Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78], Plaintiff's Motion for Summary Judgment [Dkt. #80], and Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89]. Upon consideration of the parties' pleadings, the relevant case law, and the entire record herein, this Court DENIES Plaintiff's Motion to Strike the Administrative Record Supplement, GRANTS Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule,

Appendix D

DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Intervenor-Defendant's Motion for Summary Judgment.

BACKGROUND

This Opinion represents the latest chapter in plaintiff's quest to enjoin a gaming casino in Allegan County, Michigan. This case's history is, to say the least, lengthy, and the Court, for the sake of economy, recounts only those portions necessary to its holding.

I. Statutory Framework

Since the 1800s, Congress has enacted various statutes to regulate Indian affairs. One such initiative, the Indian Reorganization Act of 1934, was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage." *See* 1-1 Cohen's Handbook of Federal Indian Law § 1.05. Its animating purpose was therefore to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1973). To that end, the IRA authorizes the Secretary "to acquire . . . any interest in lands" on behalf of groups that meet the statutory definition of "Indians." *See* 25 U.S.C. § 465. The IRA defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[2] 25 U.S.C. § 479. Land

2. While the IRA does not elaborate on what it means to be a "recognized Indian Tribe now under Federal jurisdiction," the Supreme Court recently interpreted the word "now" to refer to the date of the IRA's enactment in June 1934. *Carcieri v. Salazar*, 555

acquired pursuant to the IRA "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired," 25 U.S.C. § 465, and may be designated as part of the Tribe's official reservation, *id.* at § 467.

Like the IRA, the Indian Gaming Regulatory Act of 1998 (the "IGRA") was enacted to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). To facilitate this goal, the IGRA provides "a statutory basis for the operation of gaming by Indian tribes," *id.*, and allows gaming on land that was taken into trust as part of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," 25 U.S.C. § 2719(b)(1)(B). A tribe may be formally acknowledged if it can "establish a substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." *See* 25 C.F.R. § 83.3(a).

II. Factual Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is now a federally-recognized Indian tribe. Compl. ¶ 18. But this was not always the case. The Tribe, though in existence for over two centuries, has endured a lengthy struggle for federal recognition. It was initially recognized by the federal government between 1795 and 1855, during which time it was party to no fewer than sixteen

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U.S. 379, 382 (2009). The Supreme Court left open the question of what constitutes "Federal jurisdiction."

treaties with the United States. Compl. ¶ 15; AR001987.[3] This recognition was, however, short-lived. Beginning in 1855, the Tribe fell victim to a slew of federal policies that divested the Tribe of both its ancestral lands and its sovereign status. *See* Compl. ¶¶ 16-17.

The Tribe remained dispossessed for much of the 20th century. *See* Compl. ¶ 16-18. In 1998, after decades of landlessness, the Tribe sought to reinstate its sovereign status under the modern federal acknowledgment procedures. Compl. ¶ 18. It succeeded. On October 23, 1998, the Secretary of the Interior proclaimed the Tribe an "Indian tribe within the meaning of Federal law," thus entitling the Tribe, and its members, to a bevy of federal protections. *See* 63 Fed. Reg. 56936-01 (1998).

In 2001, shortly after receiving federal acknowledgment, the Tribe identified a 147-acre tract of land in the Township of Wayland, Michigan, ("the Bradley Tract") that it wished to acquire as its "initial reservation" under the IRA. *See* AR001438. In its ensuing trust application, the Tribe requested permission to construct and operate a 193,500 square foot gaming and entertainment facility on the Bradley Tract. AR001445. The Tribe prevailed, and on May 13, 2005, the Department of the Interior issued a Notice of Final Agency Determination accepting the Bradley Tract into trust to "be used for the purpose of construction and operation of a gaming facility." 70 Fed. Reg. 25596-02 (May 13, 2005). In January 2009,

3. References to "AR" correspond to the Administrative Record filed on October 6, 2008. *See* [Dkt. #21].

the Secretary formally acquired the Bradley Tract on the Tribe's behalf. Decl. Chairman David K. Sprague Supp. Intervenor-Def.'s Mot. Summ. J. ("Sprague Decl.") ¶ 14 [Dkt. #78-1]. Thereafter, the Tribe incurred approximately $195,000,000 in debt to develop the land. Sprague Decl. ¶ 18. Its efforts culminated in the opening of the Gun Lake Casino on February 10, 2011. Sprague Decl. ¶ 19.

III. Procedural Background

Plaintiff filed the present lawsuit on August 1, 2008 under section 702 of the Administrative Procedure Act ("APA"), arguing that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked authority to take the Bradley Tract into trust. Compl. ¶¶ 25-28. On August 19, 2009, I dismissed this action for lack of subject matter jurisdiction. Mem. Op. [Dkt. #56]. Plaintiff appealed to our Circuit Court, which reversed and held that plaintiff indeed had standing to pursue his action. *See Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). On June 18, 2010, the United States Supreme Court affirmed the Circuit Court's decision and remanded the case to this Court for adjudication on the merits of plaintiff's suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

Since this case was remanded, two events have altered the legal landscape. First, on September 3, 2014, the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire. SAR000617-

58.[4] In so doing, the Secretary expressly considered, and confirmed, its authority under the IRA to take land into trust on behalf of the Tribe. *See* SAR000650 ("The [Tribe] unquestionably was under federal jurisdiction prior to 1934. . . . [And] the [Tribe's] under federal jurisdiction status remained intact in and after 1934."). Second, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act" or "the Act"). Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b). The Act, which bears directly on the instant case, declares as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b).

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4. References to "SAR" are to the Administrative Record Supplement. *See* [Dkt. #75].

Thereafter, on October 31, 2014, the parties filed motions for summary judgment. For the following reasons, the Court GRANTS Intervenor-Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

DISCUSSION

Plaintiff would have this Court disregard the Gun Lake Act and proceed directly to the merits of his challenge. I decline to do so. Because the Gun Lake Act purports to moot plaintiffs case, it is hard to see how it can be ignored. To disregard it entirely would, moreover, violate the usual principle that a court is to apply the law in effect at the time it rules. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

As a fallback position, plaintiff argues that the Act is void because it violates numerous constitutional provisions, including separation of powers principles, the First Amendment Right to Petition, Fifth Amendment Due Process, and the ban on Bills of Attainder. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") at 25-39 [Dkt. #80-1]. For the reasons discussed herein, I reject each of these arguments and find that the Gun Lake Act is constitutional and, further, that it moots plaintiff's case.

I. APA REVIEW

Federal courts are courts of limited jurisdiction and may not reach the merits of a case absent jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 101 (1998). Plaintiff brings his suit pursuant to the Administrative Procedure Act, which entitles any person "adversely affected or aggrieved by [an] agency action" to judicial review. *See* 5 U.S.C. § 702. As the APA makes clear, there is a "strong presumption" of reviewability of agency decisions. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption, "like all presumptions," may "be overcome by . . . specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)); *see* 5 U.S.C. § 701(a) (limiting judicial review to the extent that a federal statute "preclude[s] judicial review" or the "agency action is committed to agency discretion by law"). Once that presumption is overcome, courts may venture no further into the merits of the case. "For a court to pronounce upon the meaning" of federal action when "it has no jurisdiction to do is, by very definition, for a court to act ultra vires." *See Steel Co.*, 523 U.S. at 101-02. Such is the case here.

Section 2(b) of the Gun Lake Act states that "no claims" regarding the Secretary's decision to take the Bradley Tract into trust shall be "maintained in a Federal court." *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Section 2(b) tracks, moreover, section 2(a)'s ratification of the Secretary's decision, leaving no doubt that Congress intended to have the final word. *See id.* This intent is born out in the legislative history. The House Committee on Natural Resources stated, for example, that the Act, if passed, "would void a pending lawsuit [by neighboring landowner David Patchak] challenging the

lawfulness of the Secretary's original action to acquire the Bradley Property." H.R. Rep. 113-590 (2014). The Senate Committee on Indian Affairs agreed that the Act "would prohibit any lawsuits" related to the "lands taken into trust by the Department of the Interior (DOI) for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in the state of Michigan." S. Rep. 113-194 at 3 (2014). Taken together, the Act's plain language and legislative history manifest a clear intent to moot this litigation. Barring some constitutional infirmity, this Court therefore lacks jurisdiction to reach the merits of plaintiff's claim.

II. Constitutionality Of The Gun Lake Act

While Congress may have removed this Court's jurisdiction over plaintiff's APA claim, it did not foreclose consideration of the Gun Lake Act's constitutionality. Indeed, section 2(b) only withdraws judicial review of "action[s] relating to" the Secretary's acquisition of the Bradley Tract. *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Nothing in the Act bars consideration of constitutional challenges to *Congress*'s action, and the Court declines to construe it in such a fashion.[5] Absent

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5. To construct the statute otherwise would raise serious concerns about its constitutionality, and, in such a case, I heed the "cardinal principle" of statutory interpretation and choose "a construction of the statute . . . by which the (constitutional) question(s) may be avoided." *See Johnson v. Robison*, 415 U.S. 361, 367 (1974) (alternation in original) (internal quotation marks omitted); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (finding that although a statute removed Article III jurisdiction

such an impediment, the Court may address plaintiff's constitutional challenges.

The Court's limited jurisdiction does not, however, guarantee plaintiff a victory. Quite the opposite is true. Federal statutes are presumptively constitutional, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and litigants challenging a statute's constitutionality bear an "extremely heavy burden," *United States v. Turner*, 337 F. Supp. 1045, 1048 (D.D.C. 1972). Only "the most compelling constitutional reasons" may justify invalidating "a statutory provision that has been approved by both Houses of Congress and signed by the President." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (citation and internal quotation marks omitted). Unfortunately for plaintiff, I find that he has not surmounted this burden and, accordingly, uphold the Act.

A. Separation of Powers

Plaintiff argues that the Act raises two separation of powers concerns. Plaintiff first contends that section 2(b) infringes the role of the judiciary by requiring dismissal of this action. *See* Pl.'s Mem. at 26-32. Plaintiff next argues that by reaffirming the Secretary's May 2005 decision to take the Bradley Tract into Trust, section 2(a) unlawfully imposes Congress's "own interpretation of the IRA" on the federal courts. *See* Pl.'s Consol. Reply Defs.' & Intervenor-Def.'s Opp'n to Pl.'s Mot. Summ. J. ("Pl.'s Reply") at 31

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to review an agency action, it did "not touch [the court's] jurisdiction over [the statute's] own constitutionality").

[Dkt. #90]. For the reasons discussed below, I find both arguments unavailing.

Plaintiff's first contention presents a thorny legal issue. The Constitution prohibits the legislature from coopting the judiciary's function. The seminal case on this issue is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). There, the executor of a Confederate estate sought to recover property seized by the Union army during the Civil War. In his suit, the executor relied on a statute permitting recovery for landowners that were loyal to the Union, proof of which was satisfied by receipt of a Presidential pardon. *Id.* at 131-32. After the plaintiff recovered in the Court of Claims, Congress passed a statute directing courts to construe proof of a Presidential pardon as proof of disloyalty and, further, to dismiss, for lack of jurisdiction, any cases in which proof of a Presidential pardon was submitted. *Id.* at 133-34. Faced, on appeal, with a statute that dictated how it was to adjudicate claims of Union loyalty, the Supreme Court declared the statute unconstitutional and refused to give effect to an Act of Congress that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *See id.* at 146.

Although *Klein* establishes limits on legislative power, it simply "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001). To preserve the balance of federal power, *Klein's* progeny have clarified that the Constitution is not offended when

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Congress amends substantive federal law, even if doing so affects pending litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Congress may "amend applicable law" in a way that impacts the outcome of a pending case without violating *Klein* (internal quotation marks omitted)); *see also Miller v. French*, 530 U.S. 327, 348-50 (2000) (finding no separation of powers issue where a statute "simply impose[d] the consequences of the court's application of the new legal standard"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (finding no separation of powers violation where a statute "amend[ed] [the] applicable law"). Although the line between a permissible "amendment" of the underlying law and an impermissible "rule of decision" remains unclear, federal statutes do not run afoul of *Klein* as long as they refrain from "direct[ing] any particular findings of fact or applications of law, old or new, to fact." *See Robertson*, 503 U.S. at 438.

One "sure precept" emerges from this legal thicket: "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1096. Yet because Congress may "impose new substantive rules on suits" that were not "resolved on the merits when Congress acted," courts faced with *Klein* challenges must tread lightly indeed. *See id.* at 1097.

Plaintiff argues that section 2(b) of the Gun Lake Act violates *Klein* because it mandates dismissal and, as a consequence, dictates a rule of decision. *See* Pl.'s Mem. at 26-32. Plaintiff is correct that dismissal has the same

practical effect as a judgment on the merits—it compels a favorable disposition for defendants. There is a difference, however, between a statute that dictates a particular decision on the merits, which *Klein* prohibits, and a statute that altogether withdraws jurisdiction to reach the merits, which *Klein* arguably does not preclude. *See Klein*, 80 U.S. at 146-47. The Gun Lake Act falls within the latter category. The Act does not mandate a particular finding of fact or application of law to fact. Instead, it withdraws this Court's jurisdiction to make any substantive findings whatsoever. Our Circuit Court considered—and rejected—a challenge to a similar statute, finding that a withdrawal of jurisdiction does not, by itself, violate *Klein*. *See Nat'l Coalition to Save our Mall*, 269 F.3d at 1097 (stating, without any detailed explanation, that the Act did not run afoul of *Klein*).

Congress's actions in this instance are more appropriately characterized as an effort to circumscribe the Court's jurisdiction. This, Congress most assuredly can do. The Constitution "gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress, as such, has plenary power to "define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That is precisely what happened here. Rather than dictate a particular outcome on the merits of plaintiff's case, Congress has legislatively restricted the Court's jurisdiction. I find nothing constitutionally repugnant in its exercise.

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Plaintiff argues in the alternative that section 2(a) of the Act, which "reaffirm[s]" the Secretary's May 2005 decision to take the Bradley Tract into trust, violates *Klein* because it superimposes Congress's "own interpretation of the IRA without amending it."[6] *See* Pl.'s Reply at 31. Were Congress to issue such a dictate, it would surely invade the powers of the judicial branch. *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (opining that a statute presents constitutional problems if, rather than "*changing* the substantive law, [it] direct[s] the court how to *interpret* or apply pre-existing law"). The Court takes seriously, however, the invalidation of a Congressional action and applies the "cardinal principle" that "as between two possible interpretations of a statute by one of which it would be constitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (when faced with dueling interpretations, one of which "would raise serious constitutional problems," courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

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6. The Court is reluctant to opine on this particular argument, which plaintiff presented, for the first time, in his Reply brief. As this Circuit has emphasized, "[t]he premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Considering an argument advanced for the first time in a reply brief . . . entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (citations and internal quotation marks omitted).

While plaintiff has proffered one potential reading of the statute, section 2(a) can more plausibly be read in a way that does not raise constitutional concerns, *i.e.*, as an affirmance of agency rulemaking. Nowhere does the Act instruct this, or any other, Court to ratify the Secretary's action. Nor, for that matter, does it compel "any particular findings of fact or applications of law." *See Robertson*, 503 U.S. at 438. Simply put, Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same. Endorsements of this nature are hardly unprecedented and Congress has, on at least one occasion, retroactively validated agency actions taken on behalf of Native American Tribes. *See James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990) (upholding a statute that "*ratifies and confirms* [the Wampanoag Tribal Counsel's] existence as an Indian tribe" (emphasis added)); *see also Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297, 301-02 (1937) (Congress may use its plenary power to "ratify [agency] acts which it might have authorized, and give the force of law to official action unauthorized when taken" (citations omitted)).

Given that the Act neither mandates a particular interpretation of the substantive law nor creates an impermissible rule of decision, I reject plaintiff's separation of powers challenge and turn to plaintiff's remaining constitutional arguments.

B. First Amendment Right to Petition

Plaintiff next argues that section 2(b) of the Gun Lake Act burdens his First Amendment Right to Petition the government. I disagree. The First Amendment protects the right of individuals "to petition the Government for a redress of grievances." U.S. Const. amend. I. The Right to Petition "is cut from the same cloth as the other guarantees of [the First] Amendment," and operates as "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Broad in scope, the right "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and guarantees, at a minimum, the right to seek redress from a federal decision-maker on the basis of a well-pleaded claim for relief, *see Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (citation and internal quotation marks omitted)). Laws that "significant[ly] impair" this right must, like all substantial constitutional burdens, survive "exacting scrutiny." *See Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Not all burdens are "significant" and although the First Amendment protects the right to speak, it does not ensure the right to speak to *all* tribunals. The distinction that emerges is narrow indeed. Congress may not foreclose a plaintiff's right to petition *all* decision-makers, but it may withdraw access to *some* decision-makers. *See Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 742

(1983) (invalidating a law that enjoined plaintiffs from filing "a meritorious suit" in state court). *But see Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741 (D.C. Cir. 2011) (finding that a law did not violate the First Amendment because plaintiff could at least petition the agency for relief). Construing the Right to Petition more broadly would have far-reaching implications. Were it read to require access to all tribunals, the First Amendment would run headlong into another tenet of federal governance—Congress's power to "define and limit the jurisdiction of the inferior courts of the United States." *See Lauf*, 303 U.S. at 330. This, it does not do.

Plaintiff argues that the Gun Lake Act abridges his Right to Petition because it "prohibits the filing of any other lawsuit that challenges the federal Defendant's actions taking the Bradley Property into trust." *See* Pl.'s Mem. at 32. Defendants counter that although the Act enjoins filings in federal court, it does not bar plaintiff from pursuing other avenues of redress. *See* Mem. P. & A. Supp. United States' Opp'n Pl.'s Mot. Summ. J. at 22 [Dkt. #85]; Def.-Intervenor's Opp'n Pl.'s Mot. Summ. J. at 11-12 [Dkt. #86], I agree. Plaintiff may not be able to bring his claim before this Court, but he remains free to petition federal agencies, including the Department of the Interior, for relief. Nothing in the Act can be read to restrict such advocacy and this Court sees no reason to hold otherwise.

Plaintiff argues that this alternative is insufficient because any future complaints filed with the agency, whose decision Congress has ratified, "will fall upon completely

deaf ears." Pl.'s Reply at 32. The Department of the Interior may, indeed, be reticent to reverse its position. But nothing in the First Amendment entitles plaintiff to a favorable disposition of his claim. *See Am. Bus Ass'n*, 649 F.3d at 741 (refusing to find that Congressional interference with a plaintiff's potential remedies abridges the Right to Petition). The First Amendment safeguards only a citizen's right to *express* his grievance to a tribunal of competent jurisdiction. Nowhere does it "guarantee a citizen's right to receive a government response to or official consideration of a petition for redress of grievances" and I decline to find such an assurance. *See We the People Found. Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007). Accordingly, because nothing in the Petition Clause bars Congress from restricting, as it has, the forum for judicial review, I find that the Gun Lake Act does not violate the First Amendment.

C. Fifth Amendment Due Process

Plaintiff next argues that section 2(b) of the Act violates his Fifth Amendment due process rights because it requires dismissal without allowing him to fully litigate his claim. Pl.'s Mem. at 34-35. Due process challenges are governed by a two-part inquiry: "whether [plaintiff] was deprived of a protected property interest and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). A cause of action is considered a "protected property interest" only if a court has rendered "a final judgment" in that action. *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 43 (D.D.C. 2004), *aff'd*, 184 Fed. App'x 9 (D.C. Cir. 2006) ("Causes of actions only become actionable property interests upon the entry of final judgment.").

Plaintiff here argues that because the Supreme Court affirmed his standing to pursue this action, he has a property right protected by the Fifth Amendment. *See* Pl.'s Mem. at 35. Plaintiff is correct that his standing can no longer be challenged. However, he presents no authority—nor am I aware of any—to support the proposition that the ability to bring a lawsuit constitutes the type of vested property right that the Fifth Amendment due process clause protects.[7] It would be bold, to say nothing of unprecedented, to redraw the lines of property in such a fashion. Thus, in the absence of a cognizable property right, plaintiff's due process claim fails.

D. Bill of Attainder

Plaintiff's final constitutional attack to the Gun Lake Act lies in a Bill of Attainder. Article I, section 9 of the Constitution states that "[n]o Bill of Attainder . . . shall be passed." U.S. Const, art. 1 § 9, cl. 3. This provision prohibits Congress from enacting "a law that

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7. Even assuming, *arguendo*, that plaintiff has a property right in this action, he has arguably received all the process he is due. Congress has plenary power to grant, abridge, or revoke Article III jurisdiction. As the Supreme Court has held in welfare cases, which involve an analogous Congressional power to confer, and revoke, a public benefit, "[t]he procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *See Atkins v. Parker*, 472 U.S. 115, 129 (1985) (citation and internal quotation marks omitted). In such instances, "the legislative process provides all the *process* that is constitutionally due" before Congress enacts a provision restricting litigants' judicial remedies. *See Am. Bus Ass'n*, 649 F.3d at 743.

legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A law is thus a prohibited Bill of Attainder if it punishes a specific person or entity. *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998). To determine whether a statute imposes a punishment, courts assess: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute . . . reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (quoting *Selective Serv. Sys.* v. *Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)).

Although the Gun Lake Act applies specifically to suits involving the Bradley Tract, this alone is not problematic. *See Nat'l Coalition to Save Our Mall*, 269 F.3d at 1097 (finding a "[statute's] level of specificity to be unobjectionable"). Notwithstanding its specificity, the Gun Lake Act does not qualify as a Bill of Attainder for a second reason: it is not punitive. Jurisdiction stripping is simply not "punishment" in a historical sense—it does not impose a prison sentence, a fine, or any restriction that falls within the traditional "checklist of deprivations and disabilities" proscribed by the Constitution. *See Foretich*, 351 F.3d at 1218 ("This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions."). Nor was Congress's goal to disadvantage Mr. David Patchak. The Act's express purpose was to "provide

certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014). The Act may have incidentally affected plaintiff's use and enjoyment of his property. But incidental burdens do not a punishment make. As such, plaintiff's final constitutional challenge is no more meritorious than his prior attacks.

Having rejected each of plaintiff's challenges, I find no constitutional obstacle to the enforcement of the Gun Lake Act and must decline, for want of jurisdiction, to reach the merits of plaintiff's APA challenge.

CONCLUSION

Accordingly, for all of the foregoing reasons, Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule is GRANTED, Intervenor-Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED. Finally, Plaintiff's Motion to Strike the Administrative Record Supplement is DENIED. This action is therefore DISMISSED. An Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX E

CONSTITUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

UNITED STATES CONSTITUTION, Article I, Section 1.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

UNITED STATES CONSTITUTION, Article III, Section 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Appendix E

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

UNITED STATES CONSTITUTION, Article III, Section 2.

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

UNITED STATES CONSTITUTION, Amendment V.

STATUTORY PROVISIONS

An Act

To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

Appendix E

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Public Law 113–179, 128 STAT. 1914.